

UNITED STATES DEPARTMENT OF JUSTICE  
DRUG ENFORCEMENT ADMINISTRATION  
STATUS CONFERENCE

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IN THE MATTER OF: :  
Scheduling 4-OH-DiPT, : Docket No.  
5-MeO-AMT, 5-MeO-MiPT, : 22-15  
5-MeO-DET, and DiPT :  
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Monday,  
July 11, 2022

Videoconference

The above-entitled matter came on for  
hearing, pursuant to notice, at 1:00 p.m.

BEFORE: THE HONORABLE TERESA A. WALLBAUM,  
Administrative Law Judge

**APPEARANCES:**

On Behalf of the Government:

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On Behalf of the Interested Parties:

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**ALSO PRESENT:**

ANNE COTTER, Law Clerk to Judge Wallbaum

1 P-R-O-C-E-E-D-I-N-G-S

2 1:01 p.m.

3 JUDGE WALLBAUM: This is an on the  
4 record status conference in the matter of  
5 scheduling of five tryptamines, Docket No. 22-15.  
6 I am the assigned Administrative Law Judge,  
7 Teresa A. Wallbaum. Could I have appearances  
8 from the government please?

9 MR. LOCHER: Yes, Your Honor. David  
10 Locher for the government.

11 MR. DEAN: Paul Dean for the  
12 government.

13 MR. WINKLER: And Andrew Winkler for  
14 the government.

15 JUDGE WALLBAUM: All right, thank you.  
16 For Mindstate and Tactogen?

17 MR. ZORN: Matthew Zorn of Yetter  
18 Coleman LLP.

19 JUDGE WALLBAUM: For Wallach and  
20 Morris?

21 MR. HUNTER: John Hunter with Hunter,  
22 Lane and Jampala.

23 JUDGE WALLBAUM: And for Panacea?

24 MR. HELDRETH: David Heldreth, acting  
25 as pro se.

1                             JUDGE WALLBAUM: Thank you. So yes,  
2                             Mr. Heldreth is the CEO of Panacea, and he is  
3                             appearing pro se for the company. And just so  
4                             the record is clear, Mr. Dean, thank you for  
5                             appearing. I specifically asked for someone, a  
6                             supervisor for DEA to appear, and I appreciate  
7                             you making the time to do that.

8                             The purpose of this on the record  
9                             status conference is narrow. On June 30th, 2022,  
10                            I had an off the record status conference, and  
11                            off the record status conferences are relatively  
12                            common in these proceedings especially at this  
13                            stage. At that status conference, I expressed my  
14                            frustration with the government's failure to  
15                            follow two of my orders.

16                            An order for the disclosure of  
17                            materials, including noticed exhibits, and an  
18                            order regarding the publication of the hearing  
19                            date in this matter. So first for you Mr. Dean,  
20                            I know that Mr. Beerbower was the lead counsel is  
21                            no longer with DEA, which is one of the reasons I  
22                            asked you be here today.

23                            I think I was clear in the off the  
24                            record status conference and Mr. Walker and Mr.  
25                            Winkler were there, but I am -- I wanted to

1 reiterate my frustration that the government has  
2 failed to comply with two of my orders so far,  
3 and in particular with the disclosure motion. As  
4 I said on June 30th, the government had four  
5 months to prepare, and I made it very clear they  
6 should be prepared. They had four months to  
7 prepare the documents.

8 It was a finite universe of documents,  
9 and I made it clear given my generous amount of  
10 time up front, I was not inclined to grant  
11 extensions. Again, despite all of that, when it  
12 came time for the document swap, the government  
13 was not ready and failed to produce a number of  
14 studies that the interested parties had been  
15 asking for for some time.

16 And on -- and then it became apparent  
17 that through email exchanges with the interested  
18 parties, Mr. Beerbower offered to negotiate an  
19 extension of time, but I had expressly told him I  
20 would not grant that. So I know that is -- Mr.  
21 Locher and Mr. Winkler were not lead counsel or  
22 were not even on the case for most of that.

23 So I just wanted to reiterate for the  
24 record what happened in that -- regarding that  
25 order, and so there was no reason for it to

1       become so complicated, and Mr. Beerbower's  
2       responsibility and explain that it was  
3       negligence, that he had failed to check the email  
4       and the CD for those documents, and I accept  
5       that. But they really had plenty of time to  
6       avoid that mistake.

7                   So I hope going forward I won't have  
8       that mistake again. So that's the, that's the  
9       first order.

10                  The second one, and I think the more  
11       pressing one from my perspective is the order to  
12       publish my -- the date of hearing, and this case  
13       has been pending since mid-January or February  
14       1st or February 2nd I believe I when I issued the  
15       first OPHS. So there's been a lot of procedural  
16       history. Just for your sake and for the record,  
17       I'll give a little of that procedural history.

18                  On April 22nd of 2022, the government  
19       filed a consent motion to amend the prehearing  
20       schedule, claiming that the Notice of Proposed  
21       Rulemaking did not include a specific date and  
22       time for the hearing in this matter to commence,  
23       pursuant to 21 C.F.R. Section 1308.43, paragraph  
24       (f). The government indicated that it was  
25       working diligently to prepare a Notice of

1       Hearing, but it requested that this tribunal  
2       vacate the prehearing deadlines to allow for  
3       publication of that notice.

4                  That was April 22nd. On April 26th,  
5       I held a status conference and discussed it with  
6       Mr. Beerbower, and explained to him during that  
7       status conference that I believe that I could  
8       just, if necessary, order the publication of a  
9       hearing date which was, as I'm sure you know Mr.  
10      Dean, the way it used to always be done until  
11     relatively recently, in which now that is waived  
12     in one of my prehearing orders.

13                 On April 27th, I issued an order  
14     denying the government's consent motion and in  
15     that order I noted what I had said at the status  
16     conference, which is once the merits hearing date  
17     was set, I could if necessary direct the  
18     government to publish a notice of that hearing  
19     date in the Federal Register to resolve the  
20     publication issue. That was April 27th.

21                 On June 7th, I held a prehearing  
22     conference. At that time, six weeks after the  
23     April 27th status conference, DEA had not  
24     published any Notice of Hearing, and we also had  
25     not heard any dates or any information from the

1 government about what was going on. Except there  
2 was one time I believe I asked my clerk to reach  
3 out via email and was told that there had -- it  
4 had not been published.

5 At the June 7th prehearing conference,  
6 Mr. Beerbower did not inform me of any progress  
7 on the matter. So on June 13th, I issued an  
8 order directing the government to publish my  
9 language forthwith. DEA did not file an  
10 interlocutory appeal of that order or indicate in  
11 any way that it disagreed with my language that I  
12 ordered published. So that's the background.

13 I called the June 30th status  
14 conference to address the disclosure issue, but  
15 it had been two weeks since I had issued the  
16 order to publish the Notice of Hearing and not  
17 heard anything, so I asked Mr. Beerbower what the  
18 status was, and why specifically the government  
19 had not published my order.

20 Mr. Beerbower stated that he had been  
21 instructed by the -- that the Administrator  
22 wanted her order published first, and he made  
23 clear that he meant the language DEA had  
24 suggested in the April 26th status conference.  
25 He said that he had been working on that language

1 ever since. It had gone through separate  
2 iterations and versions, and that he had worked  
3 the previous weekend to try to get it on the  
4 Administrator's desk.

5 I asked him who had instructed him not  
6 to comply with my order, and he said it was his  
7 understanding that the instruction had come  
8 directly from the Administrator. He repeated  
9 that, and the second time he said "the  
10 Administrator's Office," and that's my notes, and  
11 Mr. Locher, you looked up if you disagree with my  
12 representation. But that's what my notes say,  
13 that is what my Clerk's notes say and I had the  
14 same reaction as what you just had, which was  
15 surprise.

16 He said the Administrator -- his  
17 understanding was that it came from the  
18 Administrator's office or the Administrator, and  
19 that the direction was the April 26th language  
20 was supposed to be published first, and then I  
21 asked well what about my order, and he said if I  
22 still wanted to after then, after that, I could  
23 also publish my order.

24 And that is the main reason we're here  
25 today, and Mr. Locher, do you dispute that that

1 what was said by Mr. Beerbower at --

2 (Simultaneous speaking.)

3 MR. LOCHER: I did not mean to look up  
4 with either surprise or to disagree. That does  
5 more or less accord with my recollection.

6 JUDGE WALLBAUM: Okay, thank you. I'm  
7 sorry. I don't mean to impute anything to you,  
8 but I just wanted to give the government a chance  
9 to disagree with my recollection if you wanted  
10 to. So I find that representation troubling,  
11 because the government did not file an  
12 interlocutory appeal of my order, and that's the  
13 proper mechanism if you want the Administrator to  
14 overturn something that I have ordered.

15 And again, I don't think there's any  
16 -- there was no lack of clarity in what Mr.  
17 Beerbower said. At a minimum, somebody from the  
18 Administrator's office, if not the Administrator  
19 herself, instructed CCD to take a certain course  
20 of action in regard to a pending order. So  
21 again, I know Mr. Beerbower is no longer with  
22 DEA, but I wanted to do this on the record, and  
23 Mr. Dean, I would like --

24 As the supervisor from CCD, I was  
25 hoping that you could explain to me what happened

1       in terms of why DEA did not comply with my order  
2       to publish my language, went with prior language  
3       that I had every understanding was dead in the  
4       water, and that you did so with some involvement  
5       from the Administrator's office. Could you  
6       explain, please expand on that?

7                    MR. DEAN: Good afternoon, Your Honor.  
8       I will try. I think I will somewhat limited in  
9       what I can say because of attorney-client  
10      privilege and just internal agency deliberations.  
11      But what I can say is that the agency believes it  
12      has substantially complied with your order.  
13      While not the identical language, the fact of the  
14      matter is almost everything in your order has  
15      been published by the agency as of last week.

16                  So I'll stop there, and then if you  
17      would like to ask me specific questions, I will  
18      attempt to answer them.

19                  JUDGE WALLBAUM: Did Administrator  
20      Milgram call CCD directly and give an instruction  
21      to disregard my order, which was Mr. Beerbower's  
22      representation?

23                  MR. DEAN: Excuse me a moment, Your  
24      Honor. I'm trying to make sure that anything I'm  
25      saying is not privileged. I don't know exactly -

1       - I have no reason to dispute your  
2 characterization of what Mr. Beerbower said. I  
3 don't know that the Administrator herself called  
4 Mr. Beerbower. The agency certainly expressed  
5 its view that the notice already in process  
6 should be done first.

7                     JUDGE WALLBAUM: When you say the --  
8 who expressed their view that the April, I'm  
9 going to call it the April 26th language, that  
10 that language was in process and should be  
11 completed. Who took that view or who expressed  
12 that view?

13                     MR. DEAN: Your Honor, I'm not sure if  
14 I can give you individual names. I can say that  
15 the front office generally expressed that view.  
16 But in terms of specific individuals, I am not  
17 sure that I am at liberty to name names.

18                     JUDGE WALLBAUM: Can you elaborate on  
19 what you mean by "the front office"?

20                     MR. DEAN: By the front office, I mean  
21 the agency leadership, including the  
22 Administrator, and my not -- so let me be clear.  
23 So above Chief Counsel, we'll put it that way.

24                     JUDGE WALLBAUM: I just want to be  
25 clear when you -- that that position of the front

1 office was never in any way communicated to this  
2 tribunal, either in an order or any of the staff  
3 conferences or prehearing conferences, prehearing  
4 conference singular that I held, and I had a  
5 pending order.

6 I understand the position that you  
7 said complied substantially with that order, but  
8 it's also clear to me from Mr. Beerbower's  
9 representations and your representations that you  
10 weren't actually complying with my order. You  
11 were complying with an April 26th version that  
12 was not -- setting aside whether or not it  
13 complies with my order, that was not what was  
14 going on. You were complying, it sounds like, to  
15 a different order, a different directive.

16 MR. DEAN: Your Honor, I respectfully  
17 disagree. I think, and maybe I've misspoken or  
18 not spoken clearly enough. The agency's position  
19 is that they were complying with your order  
20 substantially by the notice that they published,  
21 which is substantially similar to your order.  
22 Obviously, for example, your order is not  
23 formatted these scheduling orders are usually  
24 formatted and things of that nature.

25 The agency's position is that it

1 substantially complied with your order because  
2 the points in your order were published in the  
3 Federal Register.

4 JUDGE WALLBAUM: All right. Well  
5 setting that aside, your representation just now,  
6 which is consistent with Mr. Beerbower's  
7 representation, was your position -- it was the  
8 agency's position that the April 26th language  
9 should be the one that was put in effect, and my  
10 reason for this hearing today is that first of  
11 all, no one communicated that to me, which is  
12 unacceptable.

13 Secondly, there was no interlocutory  
14 appeal, and third, there seems to be annulment  
15 from the Administrator's office in a pending  
16 order without an interlocutory appeal. Do you  
17 see the reason for my concern with that?

18 MR. DEAN: Absolutely, Your Honor. I  
19 can't speak -- sorry.

20 JUDGE WALLBAUM: No please, go ahead.

21 MR. DEAN: I can't speak to  
22 necessarily why you weren't notified. I keep  
23 repeating the same thing and I apologize for  
24 that, but I certainly understand your concerns,  
25 and I understand why you would be concerned. I

1 can just let you know that the agency believes  
2 that it has substantially complied with your  
3 order.

4 JUDGE WALLBAUM: And I understand that  
5 you're grappling with attorney-client privilege  
6 and deliberative process. I'm grappling with the  
7 APA, which requires me to give the interested  
8 parties a fair hearing, and I'm grappling with  
9 the regulations which say that if the government  
10 doesn't or any party doesn't agree with my  
11 pending order, you need to take an interlocutory  
12 appeal.

13 You don't get to do an ex parte  
14 communication with the Administrator about a  
15 pending order, and I don't know how to go forward  
16 from that if you can't tell me, if you can't give  
17 me any more information.

18 MR. DEAN: I don't believe I can give  
19 you any further information without conferring  
20 with chief counsel, but I think I can say that I  
21 did not mean to suggest and I'm not suggesting  
22 that the Administrator herself did something  
23 here. I thought I made it clear that it was the  
24 front office, and that's a collection of  
25 individuals who lead the agency.

1                   There is, as you're well aware, there  
2 are individuals in the front office who are  
3 partitioned off, so that there are no conflicts  
4 of interest matters in active matters that are  
5 pending. If Your Honor wanted to do some sort of  
6 in camera discussion, we could perhaps go into  
7 further detail. But I would again have to speak  
8 with either deputy chief counsel and chief  
9 counsel.

10                  JUDGE WALLBAUM: Well again, my notes  
11 say that Mr. Beerbower said two things. First,  
12 he said Administrator. Then he said  
13 Administrator's office. He didn't say front  
14 office. He didn't say people surrounding the  
15 Administrator, and I understand that DEA is large  
16 institution and there are people that are cut  
17 off.

18                  But can you make a representation  
19 today that whoever instructed you to not -- to  
20 do, take a different path than my order is not, I  
21 don't know. I think you have to make a more  
22 detailed representation, that they are not going  
23 to be an ultimate decision-maker in this case, or  
24 involved in the decision-making in this case.

25                  MR. DEAN: Yeah. I believe I can

1 represent that, Your Honor.

2 JUDGE WALLBAUM: So the -- you cannot  
3 tell me who instructed you to go forward with the  
4 April 26th language, or you will not?

5 MR. DEAN: I would have to confer with  
6 deputy chief counsel and chief counsel as to  
7 whether I could give you a name on the record,  
8 Your Honor.

9 JUDGE WALLBAUM: But is your  
10 representation that that person is not -- will  
11 not be involved in this case after a recommended  
12 decision is issued in determining the agency's  
13 final ruling on the matter. Can you make that  
14 representation?

15 MR. DEAN: I believe that I can, Your  
16 Honor, if I'm understanding your question  
17 correctly. I believe that I can, and if I find  
18 out something different, I'll of course notify  
19 the Court immediately. But I am comfortable  
20 making that representation.

21 JUDGE WALLBAUM: So again Mr. Dean,  
22 just so you understand why we're here today, I  
23 don't know what happened. The parties, the  
24 interested parties don't know what happened.  
25 There was a representation that the Administrator

1 or the Administrator's office was involved, and  
2 outside of the regulatory proceedings,  
3 procedures.

4 So I have to be able to provide a fair  
5 hearing, and if the person who's giving you these  
6 directions is involved in the decision-making  
7 process, then I think that raises a separate  
8 issue. So that's why I'm asking for a clear  
9 representation from the government that whoever  
10 gave you the instruction to do the different  
11 language is not going to be involved in reviewing  
12 my recommended decision. Do you understand that?

13 MR. DEAN: I do understand it, Your  
14 Honor, and I believe that's the case. I don't  
15 know all the individuals involved, but I do  
16 believe that's the case. That's why I said I'm  
17 willing to make that representation. If I find  
18 out that I am wrong, I will let you know  
19 immediately.

20 JUDGE WALLBAUM: Right, and can the  
21 government also make a representation that if  
22 anyone from the front office gives you  
23 instructions to do something differently than  
24 what I've offered, that you inform the tribunal  
25 of that?

1                   MR. DEAN: I think we -- I think I  
2 can. I don't --

3                   JUDGE WALLBAUM: I need more than I  
4 think I can. I need more than I think I can Mr.  
5 Dean, because at a bare minimum going forward, I  
6 have to know that the hearing is -- that  
7 everything that's happening is happening in this  
8 hearing proceeding and not in ex parte  
9 communications.

10                  MR. DEAN: Of course Your Honor, yes,  
11 yes. I understand that and yes. We can make a  
12 representation.

13                  JUDGE WALLBAUM: You can make a  
14 representation that if there's another direction  
15 to do something differently than what my order  
16 has said, that will be communicated to this  
17 tribunal promptly before, so that I can inform  
18 the interested parties?

19                  MR. DEAN: Yes, Your Honor.

20                  JUDGE WALLBAUM: I'm going to hold you  
21 to that. I'm going to hold the government to  
22 those representations. I'm also going to note  
23 that in the published Federal Register Notice of  
24 Hearing, which is 87 -- it's 87 Federal Register  
25 40167, there are two errors in your published

1 notice. The first is you have an incorrect phone  
2 number.

3 The phone number 571-362-8188 is not  
4 the phone number associated with the Office of  
5 Administrative Law Judges. It is, as far as I  
6 can tell, an employee of DEA who has nothing to  
7 do with us or with you. So you might want to sort  
8 that out, because that employee may get phone  
9 calls and not know what to do with them.

10 The second thing, and this is more for  
11 the interested parties, I have not set a  
12 location. It says Crystal City, which is  
13 currently where we are located. But it may  
14 happen in nearby, a few blocks away at DEA  
15 headquarters. That I will give everyone advance  
16 on, but it's very close and so shouldn't -- if we  
17 change places, it shouldn't be any inconvenience,  
18 and the regulations do allow me to change the  
19 location of the hearing without having to give  
20 additional notice. We would just make sure that  
21 if anyone showed here at Crystal City, they would  
22 know where the proper place was to go. Just a  
23 moment please.

24 (Pause.)

25 JUDGE WALLBAUM: All right. That's

1 all I have for the on the record hearing. Mr.  
2 Dean, if there's anything else that the  
3 government can represent to me about what  
4 happened you may -- please do so. I am taking  
5 away a couple of representations from you, and as  
6 I said, I'm going to hold the government to it or  
7 I'm going to consider the appropriate sanctions  
8 for failure to do that.

9 So if there -- is there anything else  
10 from the government about the topics I've  
11 discussed on the record?

12 MR. DEAN: I have nothing further,  
13 Your Honor.

14 MR. LOCHER: None, Your Honor.

15 JUDGE WALLBAUM: All right. Mr. Zorn,  
16 anything that I've discussed on the record, do  
17 you have any comments or questions.

18 MR. ZORN: Just two very short  
19 comments. The first is your recollection is the  
20 same as mine. I was at the informal status  
21 conference and I recall and he stated as you  
22 stated it. The second point is I heard the  
23 government invoking privilege. I personally  
24 question whether privilege can be invoked by a  
25 waiver on the record.

1                   We've had an off the record status  
2 conference, because again he offered -- Mr.  
3 Beerbower disclosed the substance of  
4 communications with the Administrator's office.  
5 The second point is I'm not sure that privilege  
6 can be invoked when it's being used to disregard  
7 a court order. I don't think the attorney-client  
8 privilege protects those kinds of communications.

9                   I have other matters, but they don't  
10 relate to this topic. So I understand Your  
11 Honor's purpose and the on the record status  
12 conference, and I will save it until we get off  
13 the record.

14                   JUDGE WALLBAUM: Thank you. Mr.  
15 Hunter, any other questions or comments from you  
16 about the topic I discussed on the record?

17                   MR. HUNTER: Yes Your Honor, briefly.  
18 I agree with Mr. Zorn and with Your Honor as to  
19 the factual representations regarding what Mr.  
20 Beerbower at our informal conference. I heard  
21 the remarks the same as Your Honor and Mr. Zorn  
22 did. I also agree that what this case seems to  
23 present is an instance of waiver, that Mr.  
24 Beerbower directly relayed the substance of the  
25 conversation that he had, and therefore the

1 communication itself and the attending  
2 circumstances of that communication I don't think  
3 are any longer covered by privilege.

4 I also expressed, I share the Court's  
5 concern about this because especially given the  
6 nature of these proceedings and the relationship  
7 between Your Honor, the Administrator and the  
8 agency itself, we have a fairly closed loop that  
9 does not seem to provide an individual due  
10 process safeguard for a problem like this, in  
11 that the -- it appears that an ex parte  
12 communication was had, and that ex parte  
13 communication substance was to disregard an order  
14 from Your Honor.

15 The agency is now claiming a privilege  
16 that prevents the parties from being able to test  
17 and understand the depths and extent of that  
18 violation, and to the extent that any relief is  
19 sought to rectify that problem, the party that  
20 will receive the interlocutory appellate relief  
21 on that question is the very party from whom this  
22 ex parte communication was established.

23 And that seems to provide very little  
24 independent review of whether an impropriety has  
25 occurred here or not. As Your Honor has pointed

1       out, neither you nor the parties understand what  
2       this was about, why it happened the way it did,  
3       etcetera.

4                   So those are my concerns, and based on  
5       those concerns I would ask if the Court can make  
6       a ruling about the claim of privilege that the  
7       agency has raised today, and I would ask that the  
8       Court overrule that claim of privilege and direct  
9       the agency to provide the content of the  
10      communication, and identify the individuals who  
11      gave them these instructions.

12                  JUDGE WALLBAUM: All right, thank you  
13      Mr. Hunter. Do you have anything else?

14                  MR. HUNTER: No Your Honor, that's it.

15                  JUDGE WALLBAUM: Thank you. Mr.  
16      Heldreth. Anything about what I discussed this  
17      on the record conference?

18                  MR. HELDRETH: Just briefly. I agree  
19      with both Hunter and Zorn on this, and also I  
20      directly heard the Administrator and the  
21      Administrator's office mentioned by the DEA as  
22      the people who were responsible for making  
23      decisions. As I've said in previous motions that  
24      I've had, I also believe there's a deep, deep  
25      problem with the communication here, which shows

1           that there cannot be a fair hearing.

2           And based on this, we again are  
3           appealing with the interlocutory appeals and plan  
4           filing an appeal on the previous one with the  
5           DEA, that the Administrator made. So we just  
6           want to put that on record, that we can go to the  
7           Appeals court on these issues, and agree that we  
8           want the privilege motion or ruling to be made.  
9           So thank you.

10          JUDGE WALLBAUM: Thank you. Mr. Dean,  
11          what about the argument that Mr. Beerbower waived  
12          any privilege on the government's behalf when he  
13          disclosed twice that there had been this  
14          communication? Don't you at a minimum have to  
15          tell me who you communicated with? How is who  
16          you communicated with covered by privilege even  
17          if it did exist?

18          MR. DEAN: Well Your Honor, I guess  
19          there's a couple of things to unpack here.  
20          Whether Mr. Beerbower spoke inelegantly and said  
21          the Administrator or even if the Administrator's  
22          office is accepting it, we can't really get to  
23          despite recollections because we don't have a  
24          transcript and I was not there at the hearing.

25          JUDGE WALLBAUM: Everybody's in

1 agreement as to what was said, even Mr. Locher,  
2 who was there. So I -- we proceed all the time  
3 with off the record status conferences, and all  
4 of the time we hold the parties, including  
5 respondents, to state -- things that were said  
6 during off the -- status conferences where there  
7 was not a court reporter.

8 So that seems to be a well-established  
9 process, that things said at a status conference  
10 can be referenced subsequently in orders in these  
11 proceedings.

12 MR. DEAN: Your Honor, yeah. That's  
13 not what I was saying. But my point was if he  
14 referenced both the Administrator and the  
15 Administrator's office, we don't know what he  
16 meant. I mean we can guess at what he's saying.  
17 I think he spoke inelegantly. I think he meant  
18 the Administrator's office. I think my  
19 references to the front office have been fairly  
20 clear. I made representations to you which  
21 should allay many of the concerns that have been  
22 raised here.

23 JUDGE WALLBAUM: Well, Administrator's  
24 office includes the Administrator, and whether  
25 that was elegant or inelegant, it still raises a

1 question that there have been communication with  
2 people administrator-adjacent, as to these  
3 proceedings.

4 (Simultaneous speaking.)

5 MR. DEAN: I think --

6 JUDGE WALLBAUM: I'm sorry?

7 MR. DEAN: I'm sorry, Your Honor. I  
8 thought you were finished.

9 JUDGE WALLBAUM: I am, go ahead,  
10 thanks.

11 MR. DEAN: I thought I had explained  
12 previously that there are procedures in place so  
13 that all those involved in issuing final  
14 decisions, final orders are not the same people  
15 who are contacted or had input into these matters  
16 while they're active in litigation. So my  
17 apologies to the extent that it wasn't clear, but  
18 I thought I had made that point previously.

19 JUDGE WALLBAUM: What about the  
20 argument that Mr. Beerbower waived any privilege  
21 when he made that representation as to who he had  
22 communicated with?

23 MR. DEAN: I think that would be a  
24 fairly wrong assertion, because I am stating now  
25 that -- and I stated to you previously that the

1       Administrator was not involved in that. I  
2       believe that's what I had said, and I also said  
3       that they had separate individuals being involved  
4       regardless, from the front office involved in  
5       reviewing this.

6                   So to the extent that perhaps I'm --  
7       I understand the gravity of the situation and  
8       Your Honor's interest in making sure there's a  
9       fair hearing, but I don't think that the fact  
10      that Mr. Beerbower may have erroneously said  
11      Administrator or Administrator's office when he  
12      was referring to a collective group of  
13      individuals, which I've been referring to as the  
14      front office, waives any sort of privilege.

15                  The agency may decide to disclose this  
16      information to you, I don't know. But they may  
17      not, and I think the agency's position at this  
18      point is that it's internal deliberation, and you  
19      have -- you have the agency's position, which is  
20      evidenced in the scheduling notice that was  
21      published, and my assurances to you on the record  
22      that we've made throughout this hearing today.

23                  JUDGE WALLBAUM: Mr. Dean, how does  
24      deliberative process or attorney-client privilege  
25      or work product, whichever privilege you want to

1       rely on, how does that protect the name of the  
2       person who gave you the instruction? That's not  
3       a content of the conversation. That's merely a  
4       title or a name. How is that covered by  
5       privilege?

6                    MR. DEAN: Well first of all Your  
7       Honor, I don't know specifically who it was, but  
8       more generally I -- so I can't help you there.  
9       But more generally, I think any sort of  
10      individuals within the agency who are involved in  
11      any sort of decision-making would not, would not  
12      have to be named.

13                  JUDGE WALLBAUM: You said earlier the  
14      agency would have to decide whether or not to  
15      provide that information. Is that still a  
16      possibility, that the government could decide to  
17      disclose that information in these proceedings,  
18      as to who specifically provided that instruction?

19                  MR. DEAN: I would have to speak with  
20      the deputy chief counsel and chief counsel, to  
21      see whether they would be willing to do that, or  
22      the agency is willing to do that. I mentioned  
23      it, so it is a possibility. Unfortunately, I  
24      can't tell you more than that at this point.

25                  JUDGE WALLBAUM: All right. Well I'll

1 let the government consider whether it wants to  
2 do that, and wants to disclose anything else.

3 Obviously I have an obligation to provide a fair  
4 hearing to the parties in this case.

5 I take that very seriously, and I've  
6 heard your representation. But this will not  
7 happen again without me being informed of it,  
8 although if we come to the point again where me  
9 being informed of it doesn't let me know who is  
10 doing it, that may pose some of the same issues  
11 that we have here right now.

12 But I'll close with saying that that's  
13 something the government can discuss internally,  
14 as to whether it wants to disclose additional  
15 information on this matter, or not. There  
16 obviously certain consequences associated with  
17 not. Anything else, Mr. Dean?

18 MR. DEAN: No, Your Honor.

19 JUDGE WALLBAUM: All right, all right.  
20 Thank you all very much.

21 MR. ZORN: May I just add something  
22 quickly for the record?

23 JUDGE WALLBAUM: Yes, Mr. Zorn.

24 MR. ZORN: There's one thing that the  
25 government said that actually bothers me, which

1           is they're for walling off certain people.

2           JUDGE WALLBAUM: I'm sorry Mr. Zorn,  
3           if I could stop you right there. That last  
4           portion was very garbled, so you might want to  
5           restate it.

6           MR. ZORN: My apologies. Let me get  
7           closer. The government said one thing that  
8           bothered me, which was there's a procedure for  
9           walling off certain people. The decision in this  
10          case is made by the Administrator and to the  
11          extent others are assisting her, or sorry the  
12          final, obviously Your Honor makes the  
13          recommendation.

14           To the extent there's any authority  
15          for others to be involved, it is a delegation  
16          from the Administrator. So this is not like a  
17          situation in private practice where you have  
18          multiple partners in a law firm and you can wall  
19          them off from each other. This all goes to the  
20          same decision-maker, and I think whoever was  
21          involved in this decision, and this is also again  
22          why who is involved actually matters, but whoever  
23          was involved in this took a delegation from the  
24          Administrator, and whoever is going to review the  
25          final decision is delegated, whether it's the

1           Administrator herself or not.

2           But legally it has to be the  
3           Administrator herself. So I don't think this  
4           walling off process, to the extent there is  
5           prejudice or bias and, you know, against the  
6           interested party including my party has already  
7           made that allegation. We cited Overton Park in  
8           our papers. I'm not going to rehash old ground,  
9           but that is not a procedure proposed by the  
10          government, which I think has any legal basis  
11          whatsoever. It all comes from the Administrator.

12          And then the other point I would note  
13          is, and I understand Your Honor's order denying  
14          our request for disclosure. I'm not here to  
15          rehash that, but I have separately made FOIA  
16          requests for judicial records. I would like the  
17          carisoprodol proceedings. It's the only  
18          precedent of recent memory. The agency is not  
19          turning that over. I don't understand the walls  
20          of secrecy that are involved in this, why you  
21          can't get simple discovery from the agency.

22          But to me, this is kind of a  
23          troublesome practice here of we can't seem to get  
24          information, and the reason that relates to what  
25          we're talking about is this was a notice of

1 hearing to allow the public to participate in  
2 these proceedings. I don't understand how or why  
3 it took them so long to do it. I'm not here to  
4 rehash that, but I just don't want that to be  
5 lost, as to why this was an important order that  
6 Your Honor put out.

7 JUDGE WALLBAUM: Thank you Mr. Zorn,  
8 and thank you Mr. Hunter and Mr. Heldreth. So  
9 that for me concludes the on the record portion.

10 I know Mr. Zorn and perhaps others  
11 wanted to address a few things, procedural  
12 matters off the record. I will note that I will  
13 receive a transcript of this hearing, of this  
14 sorry, this status conference and I will  
15 distribute that to the parties promptly upon my  
16 receipt of that.

17 So if that's all, then we can at this  
18 stage go off the record. Thank you.

19 (Whereupon, the above-entitled matter  
20 went off the record at 1:57 p.m.)

21

22

23

24

25

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